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THE RESOLUTION OF DISPUTES BEFORE THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

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Abstract
The jurisdictional framework of the Singapore courts has become more nuanced with the establishment of the Singapore International Commercial Court (SICC) on 5 January 2015 and the signing of the Hague Convention on the Choice of Court Agreements 2005 (Hague Convention) on 25 March 2015. Although the Hague Convention has yet to be incorporated in domestic law, it is expected this will happen in the near future. The SICC project, on the other hand, is part of Singapore's strategy to promote the jurisdiction as an international dispute resolution hub. In essence, the SICC is a domestic specialist court established to deal with international commercial litigation. Adapted from the arbitral model but underpinned by judicial control, central to the SICC framework are party autonomy and flexible procedural rules. The Hague Convention complements the SICC project by increasing the number of jurisdictions in which Singapore judgments will be recognized and enforced. These 2015 developments—key to establishing Singapore as the regional hub for dispute resolution—requires careful working out and an evaluation is needed of the jurisdictional regime that applies to the SICC and the internal allocation of jurisdiction as between the SICC and the Singapore High Court sans the SICC, as well as the impact of the Hague Convention. This article focuses on explaining the in personam jurisdictional rules of the Singapore High Court that now includes the SICC division. Its chief objective is to offer the international community an overview of the working framework of Singapore's version of an 'international' commercial court.

Keywords
- dispute resolution;
- Hague Convention on Choice of Court Agreements;
- international commercial disputes;
- jurisdiction;
- Singapore International Commercial Court

Footnotes
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I. INTRODUCTION

The jurisdictional framework of the Singapore courts has become more nuanced with the establishment of the Singapore International Commercial Court (SICC)[1] on 5 January 2015 and the signing of the Hague Convention on the Choice of Court Agreements 2005 (Hague Convention) on 25 March 2015. Although the Hague Convention has yet to be incorporated in domestic law, it is expected this will happen in the near future. Thus, understanding both the jurisdictional regime that applies to the SICC and the internal allocation of jurisdiction as between the SICC and the Singapore High Court *sans* the SICC, as well as the impact of the Hague Convention, is critical to the process of establishing Singapore as the leading regional hub for transnational commercial litigation.

This article focuses on explaining the *in personam* jurisdictional rules of the Singapore High Court that now includes the SICC division. Its chief objective is to offer an overview of the working framework of Singapore's version of an 'international' commercial court. The SICC is not only of relevance to the international business community who may be prospective users of this 'international' commercial court, it is also of interest to foreign lawyers who may be appointed to represent litigants in SICC disputes. The discussion will in particular consider the effect on jurisdiction of a choice of court agreement, given its centrality in the web of jurisdictional rules developing in Singapore. The previous jurisdictional framework for the High Court is first set out below in Part II. This background is necessary to appreciate the changes brought about by the 2015 developments. The article then proceeds to examine in Part III the new rules governing the jurisdiction of the SICC and those which govern the internal allocation of jurisdiction as between the High Court and the SICC. The final section, Part IV, outlines the jurisdictional regime of the Hague Convention and highlights the key areas of impact it will have on the Singapore jurisdictional regime.

II. TRADITIONAL JURISDICTIONAL FRAMEWORK

A. Existence of Jurisdiction

Before the establishment of the SICC, the traditional *in personam* jurisdictional framework applicable to the High Court of Singapore has two hallmark features. First, *in personam* jurisdiction is founded on the proper service of process on the defendant in accordance with the relevant law. Secondly, it distinguishes between the existence and the exercise of jurisdiction.[2] *Existence* of jurisdiction concerns the question whether the court*can* hear a particular case, and the basis of the High Court's jurisdiction is entirely statutory. Territorial jurisdiction in general is based on presence[3] or submission,[4] coupled with service of process; and special provision has been made for specific situations, for example, jurisdiction over corporations.[5] Extraterritorial jurisdiction is more complicated and requires the plaintiff to obtain the leave of the court for service of process on a foreign defendant, by showing that there is (1) a nexus of

jurisdiction under one of the heads prescribed in Order 11 rule 1 of the Rules of Court[6] on the basis of 'a good arguable case'; (2) a serious issue to be tried on the merits; and (3) Singapore is a proper forum to try the action.[7]

B. Exercise of Jurisdiction: *Forum Non Conveniens*

Exercise of jurisdiction refers to the issue of whether the court *should* hear the case, and this is determined according to the *forum non conveniens* doctrine. The version of natural forum doctrine adopted by Singapore law[8] is the 'most appropriate forum' test enunciated by the House of Lords in *The Spiliada*.[9] The eponymous *Spiliada* test has been accepted to varying degrees, with different modifications, across the Commonwealth. In Singapore, English cases on its interpretation and application remain persuasive. Broadly speaking, the *Spiliada* test determines forum appropriateness by reference to the interests of all the parties and the ends of justice, in two stages. In stage one, the court examines the connecting factors of the case with the competing fora. At this stage, the concept of 'appropriateness' is examined primarily from the perspective of minimization of expense and inconvenience. The connecting factors can be broadly and non-exhaustively classified into five different types: (1) personal connections; (2) connections to events and transactions; (3) governing law; (4) other proceedings; and (5) shape of the litigation.[10] The stage one exercise is not merely a quantitative one: some connections are ascribed more weight while others might have no or little bearing on the dispute, depending on the nature of the dispute and the issues it raises.

Stage two of the *Spiliada* test is concerned with the broader question of whether substantial justice can be obtained in the *prima facie* natural forum for the dispute as determined in stage one. All circumstances of the case will be canvassed, including considerations of access to practical justice,[11] although the court will be cautious not to make judgments on the distinctions between different legal systems. The *Spiliada* test thus embodies a fine balance between private justice and international comity.[12]

The same *Spiliada* test applies in cases both where jurisdiction is obtained by service within the jurisdiction and where jurisdiction is obtained by service outside Singapore. In a service-in case, the defendant bears the burden of proving Singapore is not the most appropriate forum and successful, the Singapore proceedings are stayed. In a service-out case, from a procedural perspective, arguments on forum appropriateness can be made either by way of an application to set aside the service on jurisdictional grounds or in a separate application for a stay of proceedings, subject to any argument on estoppel. Given that the test is 'essentially similar' in the two types of application[13] and the same timelines apply, the Singapore Court of Appeal helpfully highlighted in *Zoom Communications Ltd v Broadcast Pte Ltd* that 'it is wholly unnecessary and likely counter-productive … to make both a jurisdictional challenge and a stay application' on the same grounds based on forum

inappropriateness.[14] Indeed, a foreign defendant who contends that Singapore is not the appropriate forum to hear the case should raise the arguments in an application to set aside the service of process, as the burden of proof will then remain with the plaintiff.

C. The Effect of a Choice of Forum Clause on Jurisdiction

The presence of a Singapore choice of forum clause in an agreement confers *in personam* jurisdiction on the Singapore courts.[15] Its effect on the exercise of jurisdiction is slightly more complex. The starting point is that the Singapore courts will give effect to the agreement between the parties. Choice of forum clauses (jurisdictional agreements) are conventionally divided into two categories: exclusive jurisdiction agreement and non-exclusive jurisdiction agreement. An exclusive jurisdiction agreement is in essence an agreement between the parties that they will submit any disputes falling within the scope of the clause only to the contractual forum and nowhere else. Bringing proceedings in another forum would be a breach of contract. In such circumstances, where the plaintiff has brought the dispute to the Singapore courts, the defendant who wishes to litigate elsewhere must show 'strong cause' amounting to exceptional circumstances to justify the breach of contract in order to succeed in his stay of proceedings application.[16] The 'strong cause' test looks beyond the foreseeable convenience factors, as these are taken to have been within the parties' contemplation when agreeing the choice of forum. It requires a high threshold to be met and is generally focused on unforeseeable factors and the ends of justice.
Where a non-exclusive jurisdiction agreement is concerned, the court applies the *Spiliada* test. The Singapore Court of Appeal clarified in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala*[17] that the jurisdiction agreement is one of the factors to be considered in determining whether the contractual forum should *exercise* its jurisdiction. The precise weight to be ascribed to the jurisdiction agreement in this exercise depends on the circumstances of the case.[18]

This binary division between 'exclusive' and 'non-exclusive' is, however, overly simplistic because jurisdiction agreements in commercial life are of many kinds. For instance, a jurisdiction clause may be coupled with a *forum non conveniens* waiver clause.[19] Also, such clauses are not necessarily labelled as either 'exclusive' or 'non-exclusive'.[20] Yeo's other strand of analysis advocates a contractual analysis of all jurisdiction agreements, exclusive or non-exclusive. In his view, no theoretical distinction between exclusive and non-exclusive jurisdiction agreements can be made as a matter of principle, although the divide has some practical utility.[21] He argues that the scope and extent of agreement between the parties as to the forum is a matter of contractual construction in accordance with the proper law of the agreement as a whole. Unlike an exclusive jurisdiction agreement that clearly sets out the specific agreement, the construction of a non-exclusive jurisdiction agreement is more complex, and often requires inferences to be drawn.[22] The promissory content of jurisdiction agreements differs depending on the parties' intention

in each case.[23] The Court of Appeal in *Orchard Capital* appraised Yeo's contractual analysis with great interest but was not prepared to 'whole-heartedly' accept it, principally because neither party addressed the court on Yeo's arguments nor would these arguments have changed the outcome of the case.[24] It also pointed out that applying a contractual approach might be impractical at an interlocutory stage and that it could lead to uncertainty.[25]

In the later case of *Abdul Rashid bin Abdul Manaf v Hii Yii Ann*, the Singapore High Court decided that the labels 'exclusive' and 'non-exclusive' should be ascribed their ordinary meaning, unless they are not supported by the context in which they are used or if they are not consistent with the rest of the contractual provisions.[26] This decision entrenches the preference for a contractual analysis, albeit one that is tempered by presumptions of effect based on the labels that are used. To some extent, this approach mitigates the uncertainty that may result from a rigorous application of the contractual construction approach.

We now move to consider the SICC jurisdiction regime.

III. THE SICC FRAMEWORK

A. An Overview

The plan to establish the SICC was first announced by the Chief Justice of the Supreme Court of Singapore in January 2013. The *Report of the Singapore International Commercial Court Committee* (*SICC Committee Report*) was released later that year. According to the *SICC Committee Report*, owing to the continued growth of cross-border investment and trade in Asia, it is anticipated that there will be a rise in cross-border disputes and therefore there is a need for 'a neutral and well-regarded dispute resolution hub in the region'.[27] Building on the strengths of Singapore's established legal system, the SICC was set up to meet this need. The SICC project is part of Singapore's three-pronged strategy to promote the jurisdiction as an international dispute resolution hub. The other two prongs are the already thriving Singapore International Arbitration Centre as well as the recently launched Singapore International Mediation Centre.[28]

It is noteworthy that the Honourable Chief Justice Sundaresh Menon's conceptualization of the SICC was inspired by the success of the English Commercial Court which he had observed during a visit in September 2012. In his words, '[t]he London experience suggests that arbitration and commercial courts are not competing players in a zero-sum game'.[29] Indeed, it has been reported that more than three-quarters of litigants before the English Commercial Court are foreigners.[30] Recent statistics further reveal

that most of these foreign litigants come from the Middle East, north Africa and Euroasian countries such as Russia and Kazakhstan.[31] In this connection, the Honourable Mrs Justice Carr has observed extra judicially that questions have been raised regarding the English Commercial Court's readiness in accepting jurisdiction over international cases that may have no connection with England.[32]

More interestingly, the idea of establishing a specialist 'Singapore Commercial Court' based on the model and experience of the English Commercial Court was recommended to the Singapore legal community 25 years ago by Mr Richard Southwell QC, who was invited to speak at the Singapore Academy of Law. In his speech, he emphasized three factors that contributed to the popularity of the English Commercial Court: (1) the competence and experience of the judges; (2) the flexible procedures; and (3) the development of a pool of expert solicitors and barristers.[33] Mr Southwell QC also highlighted the benefits of welcoming distinguished foreign lawyers to appear before the Singapore courts, most notably, the competition will contribute to excellence of advocacy in Singapore.[34] The essential features of the English Commercial Court, including the absence of juries, are reflected in the SICC model to which we will turn momentarily. Yet, the SICC differs markedly from the English Commercial Court in other respects. The SICC does not hear domestic commercial cases and its bench comprises both domestic and international judges. Its procedural rules also bear greater resemblance to modern international arbitral rules. In that sense, it is more 'international' than the English Commercial Court.

The SICC is therefore sometimes compared with the Dubai International Financial Centre Courts (the DIFC Courts).[35] The DIFC Courts system was established initially to support the Dubai International Financial Centre, a federal financial free zone situated in the Emirates of Dubai, United Arab Emirates. In its early years, therefore, it predominantly dealt with 'domestic' disputes arising within the DIFC. Its jurisdiction expanded in 2011 to include trying actions based on parties' consent, regardless of connection with the DIFC, thereby becoming an 'international' commercial court. Both the SICC and the DIFC Courts are very similar in that they are in essence specialized *domestic* courts set up to deal with international commercial disputes. However, a key distinction is that the SICC had a different genesis: it was not established to cater for a new economic zone; it was conceived as a new model of litigation for international disputes. For this reason, the SICC is an interesting case study.

The SICC's litigation framework has been strongly influenced by the arbitral model, in that it accords a much greater role for party autonomy in the dispute resolution process than is normally encountered in the domestic court system. Most remarkably, as will be explained below, a jurisdiction agreement designating the SICC will be accorded much greater weight for establishing jurisdiction than under the traditional regime. Procedurally, there is also greater scope for parties' choice and flexibility in relation to the applicable rules of evidence,[36] confidentiality,[37] proof of foreign law directly by way of

submissions,[38] right of appeal, etc.[39] There is also broader latitude for parties to be represented by foreign lawyers in SICC cases, principally in actions that have no substantial connection to Singapore.[40] Whilst Singapore presently adopts a fused legal practice model, there is a possibility that foreign representation in SICC cases may encourage the development of a de facto bifurcation of expertise, that is, local lawyers may play a greater 'solicitor', supportive role in some SICC actions that are argued by foreign advocates.

On the other hand, compared with the arbitral model there is greater accountability and transparency in the SICC's model of dispute resolution, as it remains firmly underpinned by judicial control. Moreover, in addition to a talented pool of local judges well versed in commercial law, the SICC boasts a panel of prominent international jurists drawn from both the common law and civil law jurisdictions, who may be appointed by the Chief Justice of the Singapore Supreme Court to hear the SICC cases.41 At the time of writing, 12 International Judges have been appointed: [42]

- Justice Carolyn Berger (United States of America)
- Justice Patricia Bergin (Australia)
- Justice Roger Giles (Australia)
- Justice Irmgard Griss (Austria)
- Justice Dominique Hascher (France)
- Justice Dyson Heydon (Australia)
- Justice Vivian Ramsey (United Kingdom)
- Justice Anselmo Reyes (Hong Kong)
- Justice Bernard Rix (United Kingdom)
- Justice Yasuhei Taniguchi (Japan)
- Justice Simon Thorley QC (United Kingdom)
- Justice Henry Bernard Eder (United Kingdom),

As far as jurisdiction is concerned, the SICC has been established as a division of the Singapore High Court,[43] although the *in personam* jurisdictional rules applicable to the SICC are rather different. For clarity, any reference to the 'High Court' made below refers to the High Court *sans* the SICC division. According to section 18D of the Supreme Court of Judicature Act, the SICC has jurisdiction to hear an action if the following conditions are satisfied:

(a) the action is international and commercial in nature;

(b) the action is one that the High Court may hear and try in its original civil jurisdiction;

(c) the action satisfies such other conditions as the Rules of Court may prescribe.

The Rules of Court, the subsidiary legislation on procedure and practice, sets out three general scenarios in which the SICC has jurisdiction to hear a case. First, where the parties have submitted to the SICC's jurisdiction under a written jurisdiction agreement, and they are not seeking relief in the form of or connected with a prerogative order.[44] Secondly, where the case was transferred to the SICC from the High Court pursuant to Order 110 rule 12 of the Rules of Court.[45] Finally, the SICC has jurisdiction to hear an originating summons issued under Order 52 of the Rules of Court for leave to commit a person for contempt in respect of any judgment or order made by the SICC.[46] As this third scenario arises in very specific circumstances, the discussion will focus on the first two scenarios, in one of which the majority of SICC cases is expected to arise.

B. International and Commercial Disputes

The *in personam* jurisdiction of the SICC is necessarily bound up with its subject matter jurisdiction: international and commercial actions. The definitions of 'international' and 'commercial' are prescribed in the Rules of Court. According to Order 110 rule 1(2)(a), unless the context otherwise requires, a claim is 'international' if:

(i) the parties to the claim have, by a written jurisdiction agreement, agreed to submit the claim for resolution by the Court and, at the time the agreement was concluded, the parties have their places of business in different States;

(ii) none of the parties to the claim have their places of business in Singapore;

(iii) one of the following places is situated outside any State in which any of the parties have their place of business:

(A) any place where a substantial part of the obligations of the commercial relationship between the parties is to be performed;

(B) the place with which the subject-matter of the dispute is most closely connected; or

(iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State;

On the meaning of 'commercial', Order 110 rule 1(2)(b) prescribes a very broad understanding:

[A] claim is commercial in nature if the subject-matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including (but not limited to) any of the following transactions:

(i) any trade transaction for the supply or exchange of goods or services;

(ii) a distribution agreement;

(iii) commercial representation or agency;

(iv) factoring or leasing;

(v) construction works;
(vi) consulting, engineering or licensing;
(vii) investment, financing, banking or insurance;
(viii) an exploitation agreement or a concession;
(ix) a joint venture or any other form of industrial or business cooperation;
(x) a merger of companies or an acquisition of one or more companies;
(xi) the carriage of goods or passengers by air, sea, rail or road;

Yeo has highlighted two features of the definitions of 'international' and 'commercial' that deserve further reflection. First, the parties may by express agreement turn an otherwise domestic claim into an international claim, but they cannot by express agreement turn an otherwise international claim into a domestic claim.[47] Yeo has commented that this suggests that the parties' subjective intentions are relevant, though only in one direction. However, he cautioned that this definition must be interpreted in light of section 18D of the Supreme Court of Judicature Act,48 which is the parent statute. He suggests that one could argue for an objective approach on the basis that the asymmetric provision for subjective approach is, at the very least, 'odd'.

Indeed, this oddity surely calls for some explanation. The correct analysis must proceed from the general rules of statutory interpretation. In *Au Wai Pang v Attorney-General*,[49] the Singapore Court of Appeal commented that the Rules of Court, being subsidiary legislation, is subordinated to the Supreme Court of Judicature Act and must be 'read in harmony' with the parent statute.[50] The Court of Appeal emphasized that section 80(1) of the Supreme Court of Judicature Act clarifies that the Rules of Court 'regulate procedure and practice' but emphasized that this subsidiary legislation does not and cannot 'confer jurisdiction on the Court of Appeal by a side wind'.[51] Thus, when interpreting the meaning of 'international', it is argued that there is no patent inconsistency between Order 110 rule 1(2)(a) of the Rules of Court and section 18D of the Supreme Court of Judicature Act.[52] The former expands on the requirements set out in the latter and can be read harmoniously with it. The Legislature has deemed it fit to provide definitions of key terms in the subsidiary legislation. Moreover, section 18D(c) expressly contemplates that the Rules of Court will provide other conditions. The asymmetrical provision of a subjective approach can also be justified if one sees it as the asymmetrical provision for a party autonomy that is rooted in pragmatism. The one-way operation of party autonomy enables the SICC to hear more cases as a result of parties' exercise of choice and at the same time prevents parties from putting their case out of the reach of the SICC. Whilst this implication is not directly relevant for cases where jurisdiction is founded on the basis of a written jurisdiction agreement, it is important for cases where jurisdiction is

founded on the basis of transfer from the High Court to the SICC. As we shall see later, the High Court may without the parties' consent transfer a case to the SICC through the exercise of its own discretion. The second feature must be appreciated in the light of the first feature highlighted above. The test whether a claim is commercial in nature appears to be entirely objective.[53] Unlike the definition of 'international', there is no provision for the parties to expressly agree that the claim is commercial in nature. Whilst this may again appear to be somewhat internally inconsistent when juxtaposed with the definition of 'international', the absence of such a provision is intentional and can be justified on policy concerns. If parties could by express agreement turn their otherwise non-commercial claims into commercial claims, the SICC could find itself having *prima facie* jurisdiction over claims involving foreign sovereignty issues or even matrimonial disputes; in essence, these are claims that are not suitable for a Singapore 'international' court to adjudicate upon.

C. Written Jurisdiction Agreement

Under the SICC regime, a jurisdiction agreement is 'written' if it is recorded in such a form that its content is 'accessible so as to be useable for subsequent reference'.[54] The agreement itself may be entered into orally or by conduct; it may be entered into either at the time of conclusion of the main contract or at any other time, including after a dispute has arisen. Moreover, it is also clarified that an agreement to submit to the jurisdiction of the High Court does not of itself constitute an agreement to submit to the SICC;[55] likewise, an agreement to submit to the jurisdiction of the SICC does not of itself constitute an agreement to submit to the jurisdiction of the High Court.[56] This provision is strategic: it seeks to establish the SICC as a distinctive dispute resolution institution. Moreover, it should allay concerns about an overly liberal interpretation of the scope of jurisdiction agreements by the Singapore courts. Nevertheless, as will be addressed below, cases may be transferred from the SICC to the High Court and *vice versa*, but requirements for the relevant transfer must be met.

1. Presumption of exclusivity

Section 18 F of the Supreme Court Judicature Act provides for the effect of a jurisdiction agreement:

Effect of jurisdiction agreement

18 F.—(1) Subject to subsection (2), the parties to an agreement to submit to the jurisdiction of the Singapore International Commercial Court shall be considered to have agreed —

(a) to submit to the exclusive jurisdiction of the Singapore International Commercial Court;

(b) to carry out any judgment or order of the Singapore International Commercial Court without undue delay; and

(c) to waive any recourse to any court or tribunal outside Singapore against any judgment or order of the Singapore International Commercial Court, and against the enforcement of such judgment or order, insofar as such recourse can be validly waived.

(2) Subsection (1)(a), (b) and (c) applies only if there is no express provision to the contrary in the agreement.

Given the objective of this article as well as space constraints, only the presumption of exclusivity of jurisdiction agreements under subsection (a) will be considered here. Providing a presumption is one way of overcoming some of the uncertainty[57] that may arise as a result of a contractual approach to jurisdiction agreements.[58] Indeed, the presumption of exclusivity under section 18 F could be very helpful in cases where the parties did not describe their jurisdiction agreement as either 'exclusive' or 'non-exclusive' or spell out the precise content of their bargain.

The more immediate task, though, is to understand the way in which section 18 F affects the interpretation of a jurisdiction agreement. As discussed above, under Singapore private international law principles, the interpretation of what the parties agreed to do and not to do in a jurisdiction agreement is a matter of contractual construction and therefore governed by the proper law of the agreement. It seems both intuitive and common sense to presume that parties intend that the proper law of the substantive contract should also govern the jurisdiction agreement, particularly in cases where there is a choice of law clause.[59] However, the common law is increasingly embracing the doctrine of separability,[60] a doctrine that is typically invoked in respect of validity issues,[61] that is to say, an attack on the validity of the main agreement does not affect the validity or enforceability of the jurisdiction agreement, unless the latter is directly impugned by the same vitiating factor.[62] In principle, accepting the separability doctrine does not present any difficulty in accepting that the jurisdiction agreement is governed by the proper law of the main contract. However, its underlying rationale renders it possible to argue that there is a separate law governing the jurisdiction agreement. [63] On this basis, it may be further argued that it is more likely that the parties intended the law of the chosen court, as opposed to the law of the substantive contract, to govern the jurisdiction agreement.[64]

Having set out the relevant legal principles, there are four possible ways in which section 18 F could affect the interpretation of a jurisdiction agreement. First, where Singapore law is the proper law of the substantive contract, section 18 F could be implied into the contract as a term, that is to say, a case of implication of a term by operation of law. This analysis can operate on one of two bases. The first is that the substantive contract and the jurisdiction agreement form one agreement and is thus governed by the proper law of the agreement; the second is that the jurisdiction agreement is separable from the substantive contract, but is presumed to be governed by the proper law of the substantive contract.

Secondly, where the proper law of the contract is an issue in dispute, the court may apply the law of the forum[65] to interpret the jurisdiction agreement.[66] In this way, section 18 F would again be brought in as a term implied in law. This second analysis also operates on either of the two bases put forward for the first analysis discussed above. However, in both analyses, section 18 F has a very restricted role and it is not clear that it is intended to have such limited impact, given that the SICC is established to deal with international cases which often involve contracts governed by foreign law.

Thirdly, the jurisdiction agreement is separable from the substantive contract and is governed by a separate law. Where the SICC is the chosen court, it may be argued that the SICC jurisdiction agreement is to be governed by Singapore law even where there is no express provision.[67] It thus follows that section 18 F is implied into the contract as a term. On this analysis, it does not matter that the substantive contract is governed by a foreign law.

The fourth way in which section 18 F could be invoked to interpret a jurisdiction agreement is as a mandatory rule of the forum and therefore it applies to all jurisdiction agreements designating the SICC, regardless of the parties' express choice of law or even an absence of choice. The precise effect of section 18 F is a matter of statutory interpretation in accordance with Singapore law.[68] Yeo has considered the likely parliamentary intent behind section 18 F, pointing out that under Singapore law, '[t]here is a general presumption against extraterritoriality'[69] but that the presumption may arguably be rebutted in relation to section 18 F as it is intended to deal with cross-border cases.[70] On the other hand, he observed, the countervailing consideration is the incongruence of applying a forum mandatory rule to 'an area where party autonomy plays such a significant role'.[71] This observation is supported by the fact that section 18 F operates only as a presumption and can be rebutted by express contractual provision to the contrary. Indeed, it is argued that the very contemplation of party autonomy eviscerates the mandatory character of a rule. An example of the converse can be seen in section 27(2) of the Unfair Contract Terms Act (UCTA),[72] which prescribes that '[t]his Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside Singapore'. More importantly, forum mandatory rules are generally understood to be rules that 'express such a strong socio-economic interest' that they cannot be evaded by parties' choice.[73] Broadly speaking, the objective of mandatory contractual rules is to explicitly protect either a group of persons or the national economic system.[74] Thus, the legislative intent behind section 27(2) of UCTA is clearly to prevent evasion of the forum's statutory protection of consumers by a foreign choice of law clause. There is, however, no obvious national socio-economic interest that would justify classification of section 18 F as a mandatory rule.

The better view, therefore, is that section 18 F is not a forum mandatory rule. Nevertheless, until its status is clarified by either the High Court or the SICC (or relevant legislation), commercial parties must bear

section 18 F in mind when drafting a jurisdiction clause in favour of the SICC. If the parties' intention is to submit to the non-exclusive jurisdiction of the SICC, this should be stated in terms in the clause along with the precise effect of the non-exclusivity of the submission. This will obviate any subsequent argument on the precise status of section 18 F should a dispute arise between the parties in respect of the forum in which their disputes may be brought. It is, however, pertinent to note that, unlike the traditional regime discussed above, there is no material difference between an exclusive and a non-exclusive jurisdiction agreement for purposes of determining whether the SICC has, and should exercise, jurisdiction.

The practical impact would arise where one of the parties commences proceedings in a foreign court. Under general principles, where there is a breach of agreement (or a threat of it),[75] the other party could apply to the Singapore courts for an anti-suit injunction to restrain the other party from continuing the foreign proceedings (or commencing if only threatened). The innocent party could also sue for damages on the basis of the breach of agreement.[76] Moreover, there is the possibility that any foreign judgment delivered at the conclusion of the foreign proceedings commenced in breach of contract will be refused recognition/enforcement in Singapore by reason of being obtained in breach of the SICC jurisdiction agreement.[77] Where parties have an exclusive jurisdiction agreement, suing in a forum other than that chosen is incontrovertibly a breach of contract.

2. Existence of jurisdiction

We now turn our attention to consider how a jurisdiction agreement, exclusive or non-exclusive, affects the existence of SICC's jurisdiction and its exercise. Where existence of jurisdiction is concerned, a difference to the traditional framework is that leave under Order 11 rule 1 of the Rules of Court is not required for service of process on a defendant based overseas if there is a written jurisdiction agreement.[78] Existence of jurisdiction is established as of right. It is thus much easier for the SICC, as compared to the High Court, to be seised of jurisdiction in a case involving a foreign defendant. In particular, there is no consideration of what is the natural forum, if it is at all relevant to the SICC's jurisdictional regime. Accordingly, to establish the existence of jurisdiction, the SICC procedure does not distinguish between an exclusive and a non-exclusive jurisdiction clause.

The higher threshold to be met for service abroad under the traditional framework as compared to service within the jurisdiction is conventionally justified on the basis that the former involves an assertion of sovereign power abroad amounting to an interference with foreign state sovereignty. The aspirations to make the SICC a forum of choice notwithstanding, is there a justification in principle for this changed attitude where SICC proceedings are concerned? Some support may be garnered from Lord Sumption's enlightened view on extraterritorial jurisdiction in *Abela v Baadarani*:

This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of foreign power over the Defendant and a corresponding interference with the sovereignty of the state in which the process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of *forum non conveniens* and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional convention, notably the Brussels Convention (and corresponding regulation) and the Lugano Convention. The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ ('We command you …'). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the Defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.[79]

It should, however, be borne in mind that Lord Sumption's remarks were *obiter* in that case. *Abela* concerned an irregular overseas service of process on a Lebanese resident. The claimants were nevertheless successful in making the defendant fully aware of the English proceedings, even though their various attempts at service fell short of what was required under Lebanese law for proper service of foreign process. The UK Supreme Court, overturning the Court of Appeal's ruling, restored the trial court's decision to retrospectively validate the service by an alternative method pursuant to Civil Procedure Rules, r 6.15. Moreover, Lord Sumption's unconventional view on extraterritorial jurisdiction has been met with criticisms on grounds of principle and policy,[80] even in the wake of a generally more liberal approach towards the interpretation of grounds for service out of the jurisdiction.[81] Importantly, however, these criticisms are not directed at the more limited premise of finding extraterritorial jurisdiction where there is contractual submission. From both the jurisdictional and procedural perspectives, there is no real cause for complaint when requiring a defendant to answer a claim before a court in a country that has been chosen by him in agreement with the claimant following a simplified procedure. Indeed, it is noteworthy that Order 10 rule 3 of the Rules of Court provides that an overseas

defendant may be served in Singapore if that (and the mode of such service) is contractually agreed. Accordingly, establishing jurisdiction as of right over an overseas defendant under the SICC regime is in practice no more than taking a small step outside existing rules.

3. Assumption of jurisdiction

The more interesting inquiry relates to the principles that determine whether the SICC will actually exercise its jurisdiction where there is a written jurisdiction agreement. On this subject, Order 110 rule 8 provides as follows:

Court may decline to assume jurisdiction (O. 110, r. 8)

(1) Subject to paragraph (2), the Court may decline to assume jurisdiction in an action under Rule 7(1) if it is not appropriate for the action to be heard in the Court.
(2) The Court must not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written jurisdiction agreement between the parties.
(3) In exercising its discretion under paragraph (1), the Court shall have regard to its international and commercial character.

Assumption of jurisdiction under Order 110 rule 8 is determined by a concept of 'appropriateness', as stipulated by paragraph (1). Paragraph (2) requires that the SICC not decline to assume jurisdiction solely on the basis that the action is connected to a foreign jurisdiction. As explained above, stage one of the *Spiliada* test compares the connections with Singapore and those of any competing forum that is put forward for consideration by any party who does not wish to have the action tried in Singapore. By way of contrast, under the SICC regime, forum appropriateness is not focused on connections.[82] On one view, therefore, it seems that the *Spiliada* test is not relevant at all.

However, it is still possible to reconcile paragraph (2) with the *Spiliada* test, albeit in a slightly modified form. As jurisdiction is conferred by a jurisdiction agreement, paragraph (2) may be read as ascribing sufficient weight to such an agreement (whether exclusive or non-exclusive) in the natural forum inquiry, that consideration of connections becomes irrelevant.

Where the jurisdiction agreement is exclusive in nature, even under the traditional framework, connections with a forum other than the contractually-chosen forum will not amount to 'strong cause' for the Singapore court to countenance a breach of contract, as these factors are generally foreseeable at the time of contracting. The novelty in the SICC regime on exercise of jurisdiction is that a non-exclusive jurisdiction agreement is accorded similar treatment to an exclusive one, an innovation that is not overly

radical. The treatment is 'similar' rather than 'identical' because, whilst the same test applies, the abstract phrase 'not appropriate' under Order 110 rule 8(1) is arguably capable of being interpreted with some nuanced distinctions,[83] depending on whether it is an exclusive jurisdiction agreement or a non-exclusive one.

Which view is the correct one should depend on the parliamentary intent behind paragraphs (1) and (3). Whilst the latter clarifies that in considering 'appropriateness' under the former, the SICC is to have regard to the 'international and commercial character' of an action, it is not clear if it is permitted to consider factors other than that. The literal wording does not suggest that that is the only consideration. Could the factors affecting the defendant's ability to obtain substantial justice in the forum court that are considered at stage two of the *Spiliada* test be amongst these other factors? The problem, however, is that there have been strong judicial dicta to the effect that arguments that substantial justice cannot be obtained in Singapore courts are wholly untenable.[84] Moreover, given that jurisdiction is founded on the basis of a written jurisdiction agreement, it should not lie easily in either party's mouth to claim that justice cannot be obtained in the contractually-chosen forum. Even more importantly, it has been pointed out that the arbitral model which the SICC regime is based upon[85] suggests that the grounds for declining exercise of jurisdiction are narrow and a purposive interpretation would point to construing Rule 8(1) as setting out 'a single test for international jurisdiction, to the exclusion of common law tests'.[86] Such a construction also has the merit of certainty and simplicity, as well as being consistent with the principle of party autonomy which is of central importance in the SICC regime.[87]

Considering the alternative view that 'appropriateness' under paragraph (1) is only concerned with the 'international and commercial character' of a case brought before the SICC, the difficulty is that it would seem unduly convoluted for provision to be made in two separate paragraphs. It could have been said far more simply under paragraph (1) that the SICC shall not assume jurisdiction in an action which is not international and commercial in character. Therefore, one can reasonably assume that the concept of 'appropriateness' under paragraph (1) is not exhausted by the paragraph (3) consideration. On the other hand, what other considerations of appropriateness there are is not entirely clear, and awaits illumination. Although the mere fact of parallel proceedings (being a connection to a foreign forum) is not a ground for the SICC to decline to assume jurisdiction, it may be that a real risk of fragmenting the dispute resolution, when coupled with the general desirability of having one forum resolve all relevant disputes between related parties, remains a relevant consideration.[88] After all, it is arguable that coherency in international litigation should not be sacrificed entirely at the altar of party autonomy.

4. International and commercial character of an action

Moreover, on either view, the likely operation of Order 110 rule 8(3) in respect of the SICC's assumption of jurisdiction warrants closer scrutiny. The point to consider is this: if only the SICC has jurisdiction (i.e. existence of jurisdiction) over a matter that is international and commercial in nature, why is there a need to reconsider this issue at the later stage when considering exercise of that jurisdiction? Of course, exceptionally, it might be that a case that is seemingly international and commercial in nature involves particular issues that are not appropriate for the SICC to determine. For instance, a dispute between company shareholders (based in different jurisdictions) over the company's assets might on further examination disclose a dispute concerning matrimonial or quasi-matrimonial assets, especially as it is not uncommon today for married couples to acquire and hold assets through a corporate vehicle. The interposition of a company between individuals and property assets has presented difficult issues for determination of property ownership.[89] Such cases require an evaluation of complex policy considerations and might also involve foreign family law legislation. A challenge might therefore properly be brought to the existence of jurisdiction in the light of newly discovered facts or a reappraisal of all the material facts. If so, it is uncertain in what circumstances one should opt to challenge *assumption (exercise) of jurisdiction* on the basis of subject matter appropriateness.

On a related note, the international and commercial character of a dispute brought before the SICC by reason of a written jurisdiction agreement could be decided at the outset through the optional procedure of applying for a pre-action certificate.[90] Although such a certificate does not by itself conclusively determine that the SICC has or would assume jurisdiction over a particular dispute,[91] the objective of the procedure is to allow a party to have an early indication on jurisdictional issues and such other matters that may be certified by a pre-action certificate with far less expense than the commencement of proceedings directly. Hence, there are several avenues for reviewing the nature of the dispute: at the pre-proceedings stage of applying for a pre-action certificate to certify the international and commercial nature of the action; where the SICC considers issues of existence and exercise of jurisdiction on its own motion;[92] and where an application challenging the SICC's jurisdiction has been filed.[93]

5. Where SICC declines to exercise jurisdiction

The SICC may determine that it has no jurisdiction or decline to assume jurisdiction, under Order 110 rule 10(3) of the Rules of Court:

(a) the Court must transfer the proceedings to the High Court if –

(i) the Court considers that the High Court has and will assume jurisdiction in the case; and

(ii) all parties consent to the proceedings being heard in the High Court; or

(b) if the proceedings are not transferred to the High Court under sub-paragraph (a), the Court may dismiss or stay the proceedings, or make any other order it sees fit.

Under Order 110 rule 12(5)(a), if the case is transferred to the High Court, the latter may not reconsider whether it has or will exercise jurisdiction.

It is interesting to note that it is implied within the broad power provided for under Order 110 rule 10(3)(b) that the SICC may transfer the proceedings from the SICC to the High Court without the parties' consent if it 'sees fit' to make such an order. That being the case, one may argue as a matter of statutory construction that the lack of explicit provision for non-consensual transfer juxtaposed with the specific provision for consensual transfer under Order 110 rule 10(3)(a) suggests that the intent behind Order 110 rule 10(3)(b) is that an order for non-consensual transfer should only be made in exceptional circumstances.94 Such a construction is consistent with the paramountcy of party autonomy undergirding the SICC regime to which the parties have submitted.

As a matter of principle, in the unlikely event that the SICC contemplates a non-consensual transfer, it must consider whether the High Court has and will assume jurisdiction in circumstances where there is no submission. In this context, it is important to recognize that parties might have chosen the SICC due to its unique procedural features. In such circumstances, in theory the SICC may treat an exclusive SICC jurisdiction agreement differently from a non-exclusive one. In practice, however, it is rather difficult to conceive what exceptional circumstances could warrant a non-consensual transfer, given the narrow grounds for the SICC to decline jurisdiction in the first place. In cases where it is not proper for the SICC to exercise jurisdiction, most commonly where the disputes involve issues not appropriate for the SICC to hear (e.g. issues of foreign sovereignty or foreign family law regimes), it would usually also be inappropriate for the Singapore High Court to try the action. Accordingly, it would only be disputes involving issues concerning Singapore public policy or sovereign interests that should be transferred to the Singapore High Court even in the absence of parties' consent, given that in those circumstances no other court is better placed than a Singapore court to hear the dispute.

D. Transfer from High Court to the SICC

Although a written jurisdiction agreement is conceived to be the foundation of the SICC's jurisdiction under the new rules, for some time to come a transfer of proceedings from the High Court to the SICC will be the principal way in which the SICC is likely to be seised of disputes.[95] A transfer of proceedings from the High Court to the SICC may be made with the parties' consent or by the High Court on its own motion,[96] and subject to the satisfaction of the following requirements:[97]

If the High Court considers that —

(i) the action is of an international and commercial nature;

(ii) the parties are not seeking any relief in the form of or connected with a prerogative order;

(iii) the SICC will assume jurisdiction in the case; and

(iv) it is more appropriate for the case to be heard in the SICC;

Several related points merit fuller consideration, even if answers cannot be readily found. First, requirement (iv) encapsulates the concept of internal allocation of jurisdiction between the High Court and the SICC. The test is whether it is *more appropriate* for the SICC to hear the case. An important query is, if requirements (i) to (iii) are fulfilled, when would it *not* be more appropriate for the SICC to try the dispute?[98] After all, one may reasonably argue that a significant demarcation of the jurisdiction of the High Court and the SICC lies in the subject matter of the disputes: the SICC is a specialized court to deal with international and commercial cases. Whilst that is sound logic, there are nevertheless factors that are relevant to the test of comparative appropriateness which are not captured by requirements (i) to (iii), and these factors are particularly significant where the parties have not consented to the transfer. For instance, given that there is no time limit imposed for the High Court to consider the question of transfer, an application to the High Court to consider the possibility of transfer of an international and commercial action to the SICC by one of the parties at a relatively advanced stage of proceedings may be turned down on the basis that it is not more appropriate for the SICC to determine the case. Although evidence adduced before the High Court may be used as evidence before the SICC,[99] the transfer of proceedings to the SICC could cause substantial delay to the resolution of the dispute given that a new bench will need to be constituted. The argument against transfer is all the more compelling if all the issues in dispute are governed by Singapore law, as the High Court is self-evidently at least as competent as the SICC to resolve a Singapore law dispute.

Another situation that may arise is where the parties have explicitly provided in their written jurisdiction agreement that they have only submitted to the jurisdiction of the High Court and do not wish their proceedings to be transferred to the SICC under any circumstance. Assuming no party has a change of heart after the commencement of the proceedings before the High Court, the explicit choice and expression of their view must be a relevant and significant consideration against transfer, albeit not a conclusive one. It is strongly arguable that party autonomy should be properly recognized when deciding whether it would be more appropriate for the SICC to hear the dispute. This factor has less weight, of course, if one party consents to the transfer post-commencement of proceedings. What of the more drastic scenario where the jurisdiction agreement provides that the parties have submitted to the jurisdiction of

the High Court only and if a transfer of proceedings to the SICC is ordered by the High Court, the parties further agree to withdraw the proceedings and litigate in an alternative jurisdiction? Would the High Court uphold such an agreement or strike it down as an ouster of the SICC's jurisdiction?[100] Of course, if parties comply with their agreement, there is nothing that the SICC can do: the issue is a real one only where one party decides not to.

In addition, unlike proceedings brought directly before the SICC, [101] there is only one opportunity for review of the nature of the dispute in a transfer scenario. Once the High Court has determined that the case should be transferred to the SICC, the SICC 'must not reconsider whether it has or will assume jurisdiction'.[102] What if the transfer was ordered at a very early stage of the proceedings before the High Court but hearing on the merits before the SICC subsequently reveals issues that are not appropriate for the SICC to decide? There is no provision of a residuary power for the SICC to decline to continue hearing the case. In such circumstances, it is arguable that the SICC is not *reconsidering* its jurisdiction when dealing with arguments or material facts that could not reasonably have been raised before transfer. In those circumstances, the SICC could proceed to decline to exercise its jurisdiction in the particular case.

Finally, it is unclear what are the rules to determine whether the 'SICC will assume jurisdiction' in a transfer case. In the first place, as Yeo points out, that it is not specified whether the requirement that the SICC will assume jurisdiction (requirement (iii)), viewed in isolation, is to be considered both on subject matter appropriateness as well as on international jurisdiction appropriateness. Logically, given that subject matter appropriateness is provided for separately (under requirement (i)), one would have thought that the requirement relating to the SICC's assumption of jurisdiction is concerned only with international jurisdiction appropriateness.[103] Hence, one might immediately think of Order 110 rule 8. But there one finds that rule 8(1) specifies that it applies to cases where existence of jurisdiction is founded on the basis of a written jurisdiction agreement. Besides, Order 110 rule 8 is of little help: it incorporates a review of subject matter appropriateness under rule 8(3) that is wholly redundant given the separate requirement on subject matter appropriateness for transfer cases. Beyond that, it is not clear how the rest of Order 110 rule 8 is to be applied to determine if the SICC will assume jurisdiction in a transfer case. As mentioned above, there is no guidance regarding the concept of 'appropriateness' under Order 110 rule 8(1). As for Order 110 rule 8(2), which provides that the SICC must not decline to assume jurisdiction in an action 'that is connected to a jurisdiction other than Singapore', it is doubtful that it should be applied to determine assumption of jurisdiction in respect of a transfer case as it is framed appropriately for a case of submission by agreement, but is far less justifiable in other scenarios.

In practice, the matter is likely to become even more complex when examined against the background of the time at which the High Court considers the possibility of transfer of proceedings to the SICC. Yeo has

highlighted that a transfer of proceedings from the High Court to the SICC should ordinarily raise only issues of internal allocation of jurisdiction within the expanded High Court including the SICC.[104] If the High Court considers the possibility of transfer of proceedings after determining that it has and will exercise jurisdiction over the case, the case is necessarily sufficiently connected to Singapore. There seems little basis, beyond subject matter requirement, on which the SICC could decline jurisdiction over the dispute. If the High Court has determined that it has no jurisdiction or that it will not exercise jurisdiction, the High Court's jurisdiction to transfer proceedings is not even brought into play. Finally, where the High Court is considering the possibility of transfer of proceedings to the SICC before it has determined its own jurisdiction, Yeo has suggested that the High Court should as a matter of principle apply its own rules of international jurisdiction before considering the issue of internal allocation of jurisdiction.[105] Simply put, there should be no need in practice to consider the SICC's international jurisdiction rules in transfer cases, nor is it even clear what these rules are.

E. Joinder of Additional Parties

For completeness, some comments should be made on the SICC's jurisdiction to join additional parties to the proceedings, which is set out in Order 110 rule 9 of the Rules of Court:

(1) In an action where the [SICC] has and assumes jurisdiction, or in a case transferred to the [SICC] under Rule 12, a person may, subject to paragraph (2), be joined as a party (including as an additional plaintiff or defendant, or as a third or subsequent party) to the action if —

(a) the requirements in these Rules for joining the person are met; and

(b) the claims by or against the person —

(i) do not include a claim for any relief in the form of, or connected with, a prerogative order (including a Mandatory Order, a Prohibiting Order, a Quashing Order or an Order for Review of Detention); and

(ii) are appropriate to be heard in the [SICC].

(2) A State or the sovereign of a State may not be made a party to an action in the [SICC] unless the State or the sovereign has submitted to the jurisdiction of the [SICC] under a written jurisdiction agreement.

(3) In exercising its discretion under paragraph (1), the [SICC] must have regard to its international and commercial character.

1. Subject matter requirement?

According to the *Singapore International Commercial Court User Guides – Note 1 (Jurisdiction),*[106] save in the case of a State or the sovereign of a State, there is no requirement that the additional party sought to

be joined to the proceedings must have submitted to the SICC's jurisdiction by way of a written jurisdiction agreement. It is also clarified that there is no requirement that the claims by or against a party sought to be joined to the action must be 'international and commercial' in nature, though the SICC is to have regard to the international and commercial nature of the claims when exercising its discretion as to whether these claims are appropriate to be heard by the SICC.

The difficulty with the clarification in the *Singapore International Commercial Court User Guides* is that it is inconsistent with section 18D of the Supreme Court of Judicature Act, which expressly provides that, amongst other requirements, the SICC has jurisdiction if 'the action is international and commercial in nature'. Notably, there is no provision that the claims by and against third parties are not subject to the subject matter requirement. Given that section 18D of the Supreme Court of Judicature Act, as a legislative provision, prevails over any non-binding explanatory materials, such as the *SICC User Guides*, lawyers must understand the scope of the SICC's jurisdiction by reference to the former. If Parliament indeed intended the SICC to have more expansive jurisdiction in relation to third party claims, the quickest way to deal with this problem is by way of legislative amendment.

2. International jurisdiction?

Where the third party has not submitted to the jurisdiction of the SICC by way of a written jurisdiction agreement and is based abroad, service of process with the leave of the court pursuant to Order 11 of the Rules of Court is required. However, Yeo has observed that the requirement of Singapore being the proper forum to hear the dispute is to be interpreted in light of the international jurisdiction test provided for under Order 110 rule 9(1)(b)(ii).[107] This test is simply that the claims must be ones that are 'appropriate' for the SICC to determine. The *Spiliada* notion of 'more appropriate forum' or 'the strong cause' test does not apply where joinder of additional parties to SICC proceedings is concerned.[108] Significantly, the test of 'appropriateness' under rule 9(1)(b)(ii) is different to the test under Order 110 rule 8(2).[109] Unlike the latter, the former permits considerations of connections of the relevant claims to Singapore when determining forum appropriateness.[110]

3. Non-parties to jurisdiction agreement

A question hitherto not considered is whether non-parties can rely on or be bound by an SICC jurisdiction agreement and if so, how does that affect the SICC's jurisdiction? A case of some relevance is *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)*.[111] In that case, a contracting party commenced a suit in New South Wales (NSW) against third parties to the contract when similar proceedings involving substantially the same issues had been commenced already before the English courts. The relevant contract was governed by English law and contained an exclusive choice of English court clause. Also,

the contract excluded the application of the Contracts (Rights of Third Parties) Act 1999 (UK), though it 'confers rights' on those third parties.[112] The third parties successfully applied for a stay of the NSW proceedings. Relevantly, the NSW Court of Appeal held that the third parties were entitled to rely on the protection of the exclusive choice of English court agreement, and that they could, in their own right, enforce this clause.

After an analysis of the judgment, Chong argues that the decision may be justified by the maxim *interest reipublicae ut sit finis litium* (it is in the public interest that litigation comes to an end).[113] More importantly, she distilled two issues from the case as being important. The first issue relates to contract construction to discover the parties' intention: specifically, whether the jurisdiction agreement is intended to include the relevant non-party. Following an affirmative answer on this, one proceeds to the issue of enforcement by the non-party. In her view, where a non-party seeks to enforce a jurisdiction agreement, three questions may be considered: (a) whether the privity rules of the governing law permit direct enforcement by the non-party;[114] (b) whether the court's exercise of discretion against the non-party would result in circuitous action; and (c) whether the court hearing the stay application could invoke the natural forum doctrine to ensure that all proceedings are heard in the most suitable forum, in view of related proceedings already taking place in the contractually-chosen forum.[115]

If an action has been commenced between contracting parties, it is submitted that most of the considerations identified by Chong under both of the issues she focused on are, *mutatis mutandis*, relevant to any determination of whether it would be appropriate for the SICC to hear third party claims under Order 110 rule 9. Under the SICC regime, where a third party is applying to join proceedings (for example, as a plaintiff), the same issues are relevant, save that question (c), concerning invocation of the natural forum doctrine, is irrelevant to Order 110 rule 9.[116] Where the third party is resisting jurisdiction, the relevant modified questions are: whether as a matter of contractual construction, the jurisdiction agreement is intended to include the non-party; whether the third party would be *bound* by the jurisdiction agreement; whether *not* exercising jurisdiction against the third party would result in circuitous action.

F. Reflections

In conclusion, when considering the jurisdictional framework of the SICC there are areas in the rules that deserve clarification. In particular, a recurrent issue is the lack of clarity as to the content of the test of 'appropriateness', and the analysis above has suggested that the test should be different in different contexts. Other than legislative intervention, clarification on some of the rules could come in the form of user guides or judicial interpretation, though the latter must wait for disputes that put the issues squarely before the court and will likely be some time in arriving.

In the next section, the impact of the Hague Convention is considered.

The objective of the Hague Convention (the Convention) is to promote international trade and investment through an international regime of judicial cooperation that enhances the certainty and effectiveness of jurisdiction agreements between parties to commercial transactions in the Contracting States. The main attraction of the Convention is the recognition and enforcement of a judgment from a Contracting State in another Contracting State, subject to a limited list of defences. It seeks to replicate the effectiveness of the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in the context of recognition and enforcement of judgments in international commercial litigation. At the time of writing, other signatories to the Convention are Mexico, the United States and the European Union. Mexico ratified it in 2007; the European Union deposited its instrument of approval of the Convention in June 2015, and the Convention has entered into force on 1 October 2015.[117] Singapore's objective in being a Contracting State of the Convention is apparent: it will greatly increase the number of jurisdictions in which Singapore judgments (including SICC judgments) are recognized and enforced.[118] However, practical considerations aside, the Convention, once it is incorporated into the law of Singapore,[119] will further complicate the jurisdictional framework for commercial litigation in the country.

A detailed examination of the likely impact of the Convention on Singapore law (including its rules on recognition and enforcement of foreign judgments) deserves a full article on its own. Indeed, Yeo has addressed a number of aspects in a wide-ranging article,[120] and this can be supplemented by a reading of related and more general jurisprudence on the Convention.[121]This section has a much more modest aim. For completeness of the overview of the jurisdictional framework of the Singapore courts, it outlines the jurisdictional principles of the Convention and highlights the key areas of impact it will have on the Singapore regime.

A. Overview

1. Scope

The Convention applies in ‘international cases to exclusive choice of court agreements concluded in civil or commercial matters’.[122] Its scope is limited by three requirements. The first requirement is an ‘international’ case. For jurisdictional purposes,[123] the Convention adopts a wide definition of ‘international’ to refer to all cases other than one where the parties are resident in the same Contracting State and the ‘relationship of the parties and all other elements relevant to the dispute’ are connected only with that Contracting State.[124]

The second requirement is that there must be an 'exclusive jurisdiction agreement'. For the purposes of the Convention, an 'exclusive jurisdiction agreement' must be in writing or in any other forms of communication such that the content is accessible or usable for later reference.[125] The jurisdiction agreement must designate the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of other courts.[126] Where the exclusivity is not expressly provided for, the jurisdiction agreement shall be presumed to be so, unless the parties have provided otherwise.[127] The jurisdiction agreement must be exclusive in respect of all parties.[128] An asymmetric jurisdiction agreement that is exclusive in respect of one party but non-exclusive in respect of another does not fall within the scope of the Convention. Nor does a jurisdiction agreement designating the courts of more than one jurisdiction (e.g. either A or B) to hear the disputes.

Finally, the exclusive jurisdiction agreement must be concluded in respect of 'civil or commercial' matters. Article 2 clarifies that 'civil or commercial' matters do not include contracts of employment, family law matters, wills and succession, carriage of passengers and goods, various types of maritime liability, anti-trust matters, etc. Evidently, a few of the excluded matters are what would conventionally be considered as *commercial* matters.[129]

2. Three basic rules

The Convention regime is a mandatory one with no opt-out provision. It is characterized by three basic rules. The first is enshrined in Article 5: a chosen court must hear the case unless the jurisdiction agreement is null and void[130] under the law of the chosen court, including its choice of law rules.[131] The Convention regime therefore excludes the natural forum doctrine and considerations of parallel proceedings.[132] The main purpose is to enhance the effectiveness of choice of court agreements by greatly reducing the role of the court's discretion in determining whether it should exercise jurisdiction when it is seised of jurisdiction. Article 5(3), however, allows the courts of the Contracting States to apply their own rules governing subject matter and quantum of the claim as well as rules on the internal allocation of jurisdiction amongst the domestic courts of a Contracting State. In respect of internal allocation of jurisdiction, Article 5(3)(b) specifically directs that where the chosen court has discretion in respect of transfer of proceedings, 'due consideration should be given to the choice of the parties'.
The second rule is that a non-chosen court must not hear the case, unless one of the five exceptions provided for under Article 6 applies. The third rule (Article 8) is that a judgment delivered by the chosen court must be recognized and enforced in other Contracting States, subject to exceptions set out in Article 9.

B. Impact on Singapore's Jurisdictional Regime

1. Jurisdiction agreements

The meaning of an 'exclusive jurisdiction agreement' is different depending on whether one is referring to the common law, the Convention or the SICC.[133] Where the jurisdiction agreement is considered exclusive under all three regimes, it has been observed that there is a 'convergence in the approaches' marked by the centrality of the principle of party autonomy, albeit the relevant tests are expressed differently.[134] The convergence does not promise that the same result will be reached in all cases, however. In particular, the common law 'strong cause' test clearly admits a broader range of reasons for declining to exercise jurisdiction.[135] For example, unforeseeable fragmentation of litigation involving multiple parties remains a strong concern in the common law regime, even where there is an exclusive jurisdiction agreement.[136]

In the case of a non-exclusive jurisdiction agreement, on the other hand, the approaches are markedly different. The common law applies the *Spiliada* test; the Convention does not apply;[137] and the SICC does not distinguish between a non-exclusive and an exclusive jurisdiction agreement for the purpose of jurisdiction.[138]

In other words, the distinction between an exclusive and a non-exclusive jurisdiction agreement will continue to be significant for Singapore private international law. In fact, a more nuanced distinction between a Convention exclusive jurisdiction agreement and other kinds of exclusive jurisdiction agreement is likely to emerge, adding to the complexity.

2. Internal allocation of jurisdiction

It is important to note that the scope of the Convention is not coterminous with the SICC's scope of jurisdiction. The Convention only deals with cases of exclusive jurisdiction agreements and its definition of 'civil or commercial' matters includes civil and non-commercial matters as well as excluding certain commercial matters.[139] A Convention exclusive jurisdiction agreement may state that disputes are to be tried by 'the Singapore courts'. Where the subject matter of the dispute is not 'international and commercial' as defined under the SICC regime, a Convention case may be heard in the High Court but the High Court must apply the jurisdictional rules of the Convention.

Of course, a Convention case may be an SICC case. Indeed, the Convention envisages an exclusive jurisdiction agreement that specifically designates one division of the court system in the Contracting State.[140] But the mere fact that there is such an exclusive jurisdiction agreement designating the SICC

does not mean that the SICC will indeed try the action. It must (not least under the Rules of Court) decline to hear the case if the action is not 'international and commercial' in character.[141] More interestingly, what is the course of action to follow, in view of Article 5(3)(b) of the Convention? Where the parties have consented to a transfer of proceedings from the SICC to the High Court, there is no real problem. The difficulty arises where at least one party objects to the transfer. Notwithstanding that the SICC has the power in principle to order a non-consensual transfer of the case to the High Court,142 such an order could be viewed to be inconsistent with the prescription in Article 5(3)(b) that 'due consideration should be given to the choice of the parties'. It is certainly arguable that a dismissal of proceedings is the more appropriate order to make in *some* circumstances.[143] If a non-consensual transfer is ordered in either scenario, it is important to note that Article 8(5) of the Convention provides that 'recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin'.

The converse situation where there is a Convention exclusive jurisdiction agreement that specifically designates the High Court as the forum for dispute resolution must also be considered. If the dispute is international and commercial in nature, it is thus a matter that the High Court would ordinarily consider for transfer to the SICC. Again, the complication arises where at least one party to the proceedings objects to the transfer. Notwithstanding that the High Court has the power in principle to order a non-consensual transfer to the SICC, it must take into account the prescription in Article 5(3) in its exercise of discretion. Indeed, it may be said that in such a situation it is arguably not 'more appropriate' for the SICC to hear the dispute.

V. CONCLUSION

There are two immediate practical implications arising from the discussion above. First, careful drafting of jurisdiction agreement is critical and involves careful consideration of a number of factors. In deciding to submit future contractual disputes to the courts of Singapore, parties should now also make a conscious decision whether to submit these disputes to the SICC or to the High Court *sans* the SICC; this applies whether they decide upon an exclusive or a non-exclusive jurisdiction clause. This decision may have far-reaching consequences as far as recognition and enforcement of the judgment is concerned; and should take into account for which disputes the chosen court is appropriate. This last point requires some elaboration. There can be many different kinds of dispute arising out of the same contract. Commercial parties to a cross-border transaction may have a multi-pronged jurisdiction agreement prescribing, for instance, for 'international and commercial' disputes to be submitted to the SICC and all other disputes (and possibly even applications for interlocutory relief in an international and commercial dispute in respect of which the SICC is chosen for the substantive proceedings)[144] to be submitted to the High Court

or the courts of another jurisdiction. *Ex ante* planning can become very complex. Secondly, jurisdictional disputes are likely to increase as not only do new regimes almost inevitably attract fresh disputes on interpretation and application of the new rules and their interaction with the established ones, but the ambiguity in those rules and the potential applicability of the different regimes depending on subject matter scope and possibility of transfer of proceedings together provide new avenues for lawyers to fight jurisdictional battles.

It may seem ironic that although both the SICC and the Convention strive for certainty and simplification in international and commercial matters and yet, when they are juxtaposed with the common law regime, there remains much that is hazy. This is not to say that their merits are thereby diminished: indeed, the very complexity of international commercial transactions highlights the importance of far-sighted initiatives such as these whose worth will be seen only in the course of time as they are refined and develop.

POSTSCRIPT

Since the completion of this article, there have been some amendments to the Rules of Court that affect the SICC jurisdictional regime. It is not possible to discuss these amendments fully in this short postscript, but it suffices for present purposes to highlight a few key points.

1. The definition of 'commercial' under Order 110 rule 2(b) has been amended to include the case where parties 'have expressly agreed that the subject matter of claim is commercial in nature'. Under Part III, section B of the article, I provided justification for a completely objective assessment of the 'commercial' nature of the dispute, chiefly for policy reasons, to avoid the case of the SICC finding itself to have prima facie jurisdiction over claims that are not appropriate for its resolution.

2. Order 110 rule 10(3)(a)(i) has been amended to read 'the Court considers that the High Court has jurisdiction in the case'. The previous version is set out under Part III, section C, sub-part 5 of the article. For transfer of proceedings from the SICC to the High Court, one should also consider Order 110 rule 12(3)(a general provision). The relationship between the two provisions require fuller consideration.

3. In Order 110 rule 12(4), which concerns the transfer of proceedings from the High Court to the SICC, the requirement that 'the SICC will assume jurisdiction in the case' has been deleted (see discussion under Part III, section D). The implication of this amendment is that the uncertainty in relation to the operation of Order 110 rule 12(4) has been reduced to some extent.

Notes

[1] For general information, see <http://www.sicc.gov.sg>. See also Wong, DH, 'The Rise of the International Commercial Court: What Is It and Will It Work?' (2014) 33 CJQ 205 [Find Full Text] [Google Scholar].

[2] *Bradley Lomas Electrolok v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 (SGCA).

[3] Including transient presence: see *Maharanee of Baroda v Wildenstein*[1972] 2 QB 283 (CA).

[4] Submission can be by way of an agreement or by taking a step in the Singapore proceedings.

[5] See sections 16 and 17, Supreme Court of Judicature Act (Cap 322, Rev Ed 2007); Order 10 rule 2 and Order 62 rule 4, Rules of Court (Cap 322, R5); sections 376 and 387, Companies Act (Cap 50, Rev Ed 2006).

[6] Cap 322, R5 [Rules of Court].

[7] *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] SGCA 44, [2014] 4 SLR 500 [*Zoom Communications*].

[8] *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] SGCA 36, [2008] 4 SLR(R) 543; *JIO Minerals FZC v Mineral Enteprrises Ltd* [2010] SGCA 41, [2011] 1 SLR 391 [*JIO Minerals*].

[9] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL). cf the Australian approach which determines forum appropriateness by reference to the inappropriateness of the home forum only, thereby avoiding making judgments on foreign legal systems but arguably leading to a more chauvinist result. See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HCA).

[10] *JIO Minerals* (n 8) [42].

[11] See eg *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2011] 4 All ER 1027.

[12] Yeo TM, *Halsbury's Laws of Singapore* (2013 Reissue, LexisNexis 2009) vol 6(2), [75.096] [*Halsbury's Laws of Singapore*].

[13] *Zoom Communications* (n 7) [77].

[14] ibid [79].

[15] See section 16(1)(b) of the Supreme Court of Judicature Act. The presence of a Singapore jurisdiction agreement does not dispense with the need for service of process.

[16] *The 'Jian He'* [1999] SGCA 71, [1999] 3 SLR(R) 432; *Golden Shore Transportation Pte Ltd v UCO Bank* [2003] SGCA 43, [2004] 1 SLR(R) 6. In the converse case where the plaintiff has brought a dispute before the Singapore court in breach of an exclusive jurisdiction clause in favour of a foreign court, the plaintiff bears the burden of proving 'strong cause'.

[17] [2012] SGCA 16, [2012] 2 SLR 519.

[18] ibid [25]. In coming to this view, the Court of Appeal was persuaded by Yeo's analysis regarding the impact of a jurisdiction agreement on the forum appropriateness inquiry in 'The Contractual Basis of the

Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements' (2005) 17 SAcLJ 306 [Find Full Text] [Google Scholar].

[19] The English High Court has recently considered the effect of a non-exclusive choice of court agreement (in favour of English and Malaysian courts) coupled with a *forum non conveniens* waiver clause: *Standard Chartered Bank (Hong Kong) Limited v Independent Power Tanzania Limited* [2015] EWHC 1640 (Comm), [2015] 2 Lloyd's Rep 183. Flaux J held that the combination of the clauses does not preclude an English court from granting a stay of proceedings in favour of a foreign court where exceptional grounds amounting to a 'strong cause' justifying a departure from the agreement can be demonstrated.

[20] See eg the jurisdiction clause that was in dispute in *Hin-Pro International Logistics Limited v Compania Sud Americana De Vapores SA* [2015] EWCA Civ 401, [2015] 2 Lloyd's Rep 1. Also, increasingly, parties in international financing agreements are favouring the use of a unilateral hybrid jurisdiction clause which essentially confers on one party (typically the lender) the right to sue in a number of jurisdiction while restricting the other party (the borrower) to sue in only one jurisdiction.

[21] Yeo, 'The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements' (n 18).

[22] ibid.

[23] ibid 352.

[24] [2012] 2 SLR 519, [26]. The Court considered ([27]) that even if Yeo's contractual approach had been applied, the clause would still be characterized as non-exclusive in nature.

[25] ibid [26].

[26] [2014] 4 SLR 1042, [45]–[47].

[27] A copy is the *SICC Committee Report* is available at: <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>.

[28] In conjunction with the Singapore International Mediation Institute.

[29] See Sundaresh Menon (Chief Justice of the Supreme Court of Singapore), 'International Courts: Towards a Transnational System of Dispute Resolution' (Opening Lecture for the DIFC Courts Lecture Series 2015, 19 January 2015) <https://www.supremecourt.gov.sg/data/doc/ManagePage/5741/Opening%20Lecture%20-%20DIFC%20Lecture%20Series%202015.pdf>.

[30] Jane Croft, 'Three-quarters of litigants in UK Commercial Court are foreign', *The Financial Times* (29 May 2014) <http://www.ft.com/cms/s/0/4c33f0c0-e716-11e3-88be-00144feabdc0.html#axzz3xOjZCIYM>.

[31] ibid.

[32] The Honourable Mrs Justice Carr, 'Closing Address for British Turkish Lawyers Association seminar – The inner temple' (13 September 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/justice-carr-btla-190913.pdf>.

[33] Southwell, R QC, 'A Specialist Commercial Court in Singapore' (1990) 2 Singapore Academy Law Journal 274, 275 [Find Full Text] [Google Scholar].

[34] ibid 284.

[35] The DIFC Courts are common law courts. For general information, see <http://difccourts.ae>. See also the comparison between the two municipal court systems in Sundaresh Menon (Chief Justice of the Supreme Court of Singapore), 'International Courts: Towards a Transnational System of Dispute Resolution' (n 29).

[36] Parties may apply for other rules of evidence to apply to their SICC proceedings, and these rules need not be part of foreign law.

[37] Although the SICC model generally envisages open court hearings and the publication of its judgments, it is possible for a party to apply to the court for a confidentiality order. Importantly, the SICC takes a more liberal approach in making a confidentiality order where the case is an 'offshore' case (in essence, a case with no substantial connection to Singapore), as well as where there is an agreement between the parties regarding the making of such an order. See Order 110 rule 30, Rules of Court.

[38] The traditional common law rule requires foreign law to be pleaded as facts and proved by expert evidence, giving rise to problem such as high costs as well as lack of objectivity or deficiency in evidence in some cases.

[39] For a general discussion of the salient procedural features of the SICC, see M Yip, 'Special Reports – Singapore International Commercial Court: A New Model for Transnational Commercial Litigation' (2014) 32 Chinese (Taiwan) Yearbook of International Law and Affairs (forthcoming).

[40] These are termed the 'offshore' cases, that is, where (a) Singapore law is not the law applicable to the dispute and the subject matter of the dispute is not regulated by Singapore law or (b) the only connection to Singapore is the parties' choice of Singapore law as the governing law as well as their submission to the jurisdiction of the SICC. For more information on foreign representation, see *Singapore International Commercial Court User Guides – Note 3 (Foreign Representation)*<http://www.sicc.gov.sg/documents/docs/SICC_User_Guides.pdf>.

[41] The judges hearing the SICC cases may be drawn from the Judges of Appeal, Judges, Senior Judges or the International Judges of the Supreme Court. For more information, see: <http://www.sicc.gov.sg/Judges.aspx?id=30>.

[42] In general, proceedings before the SICC are to be heard either by a single judge or by three judges. In a case where three judges are appointed to determine the dispute, the Chief Justice shall appoint one of them to preside.

[43] Section 18A, Supreme Court of Judicature Act.

[44] O 110 r 7(1), Rules of Court.

[45] O 110 r 2(a), Rules of Court.

[46] O 110 r 2(b), Rules of Court.

[47] Yeo TM, 'Staying Relevant: Exercise of Jurisdiction in the Age of the SICC' (Eighth Yong Pung How Professorship of Law Lecture 2015, Singapore, 13 May 2015) 7–8 <http://law.smu.edu.sg/sites/default/files/law/CEBCLA/YPH-Paper-2015.pdf>.

[48] The statutory provision has been set out in discussion above, at text around fn 43.

[49] [2014] SGCA 23, [2014] 3 SLR 357.

[50] ibid [33].

[51] ibid [34].

[52] Section 18D of the Supreme Court of Judicature Act does not explicitly provide that the term 'international' is to be read objectively, even though the absence of explicit provision *per se* may lean towards an objective reading.

[53] Yeo (n 47) 8. Please see Postscript.

[54] Order 110 rule 1(2)(e), Rules of Court. Model SICC jurisdiction agreements are available at: <http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf>. Although the basic model clauses templates do not expressly prescribe that the jurisdiction agreement must be governed by Singapore law, it is briefly noted that '[h]aving an express provision for the jurisdiction clause to be governed by Singapore law would facilitate effective submission to the SICC'. The comprehensive model clauses templates, on the other hand, expressly specify that the jurisdiction agreement is to be governed by Singapore law. SICC's preference is therefore for the jurisdiction agreement to be governed by Singapore law; the main contract may, however, be governed by a different law.

[55] Order 110 rule 1(2)(c), Rules of Court. It should be noted that Order 110 r 1(1) defines 'High Court' to refer to the Singapore High Court, excluding the SICC division. It is thus unclear whether submitting to the 'Singapore High Court' without more is not submission to the SICC. For prudence, parties should be very specific in the description of the desired court in drafting their jurisdiction agreement.

[56] Order 110 rule 1(2)(d), Rules of Court.

[57] The contractual approach to jurisdiction agreements can invite a very vigorous analysis with many factors to be weighed up and considered, thereby contributing to a lack of certainty. See eg *Hin-Pro International Logistics Limited v Compania Sud Americana De Vapores SA* (n 20).

[58] This is only a partial solution for it does not completely avoid uncertainty. For instance, if the jurisdiction clause is explicitly described as 'non-exclusive', such drafting would *prima facie* rebut the presumption under section 18F of the Supreme Court of Judicature Act and the court must proceed to

interpret what is the precise promissory content of the clause, assuming the proper law of the contract applies a contractual analysis of such clauses.

[59] *Halsbury's Laws of Singapore* (n 12) [75.116].

[60] See generally A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) ch 3. See also *FAI General Insurance Co Ltd v Ocean Marine Mutual P & I Assoc Ltd* [1998] Lloyd's Rep IR 24; *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543, [30].

[61] See eg art 3(d) of the Hague Convention which provides: 'An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.'

[62] *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784 (Com Crt).

[63] *Halsbury's Laws of Singapore* (n 12) [75.116].

[64] ibid.

[65] Introducing a presumption of exclusivity as part of the *lex fori* is not an innovative technique, See eg Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1, art 23 and the draft Hague Convention on Exclusive Choice of Court Agreements, art 3(b). However, the presumption introduced in these two instruments is of greater impact and therefore utility owing to its application by a group of countries as a result of agreement or otherwise.

[66] Where parties fail to prove the content of the foreign governing law of the contract, the relevant foreign law is presumed, as a rule of convenience, to be the same as Singapore law. See *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] SGHC 88, [2010] 3 SLR 267, [25]; *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042, [44].

[67] Parties may, of course, explicitly provide that the jurisdiction agreement is governed by a foreign law. In such circumstances, the presumption under section 18F(1)(a) is rebutted by provision to the contrary (see section 18F(2)). See also fn 54.

[68] J Hill and A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th edn, Hart Publishing 2010) [14.3.5].

[69] Yeo (n 47) 10, citing *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd* [2014] SGCA 14, [2014] SLR 815, [48] (a case concerning the interpretation of a statutory provision on insolvency).

[70] ibid 10.

[71] ibid 10.

[72] Cap 396, Rev Ed 1994.

[73] Fawcett, J, 'Evasion of Law in Private International Law' (1990) 49 CLJ 57 [Find Full Text] [CrossRef] [Google Scholar].

[74] ibid 60. See also Hill and Chong (n 68) [14.3.2].

[75] If there is no breach of agreement, the anti-suit injunction is available on very limited grounds: where Singapore is the natural forum for the dispute and where the commencement/continuation of the foreign proceedings amounts to vexatious, oppressive or unconscionable behaviour. See *Halsbury's Laws of Singapore* (n 12) [75.127]–[75.132]. See eg *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 and the detailed analysis of that case by the Singapore High Court in *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [111]–[127].

[76] *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517. The English Court of Appeal recently confirmed a damages award for breach of a jurisdiction agreement: *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544.

[77] See Yeo (n 47) fn 47; although of course that may be of no practical effect if the breaching party has no assets in the Singapore jurisdiction.

[78] O 110 r 6, Rules of Court.

[79] [2013] UKSC 44, [2013] 1 WLR 2043, [53].

[80] See Dickinson, A, 'Service abroad – an inconvenient obstacle?' (2014) 130 LQR 197 [Find Full Text] [Google Scholar].

[81] See Dickinson, A, 'Restrained no more? Service out of jurisdiction in the 21st century' [2010] LMCLQ 1 [Find Full Text] [Google Scholar]; Dickinson, A, 'Service out of jurisdiction in contract cases: straightening out the deck chairs' [2012] LMCLQ181 [Find Full Text] [Google Scholar].

[82] See also *Singapore International Commercial Court User Guide – Note 1 (Jurisdiction)*, para 4 which explains that 'the fact that there are few or no connecting factors to Singapore does not constitute a basis to ask the Court to decline to assume jurisdiction' <http://www.sicc.gov.sg/documents/docs/SICC_User_Guides.pdf>.

[83] For instance, where an exclusive jurisdiction agreement is concerned, it can be reasonably argued that the threshold to meet for proving that it is 'not appropriate' for the SICC to hear the case is higher than where parties have agreed to a non-exclusive jurisdiction agreement.

[84] *The Herceg Novi* [1998] SGHC 303; *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2003] SGHC 142, [2004] 2 SLR(R) 457, [62]. cf *Halsbury's Laws of Singapore* (n 12) [75.101]. Yeo has persuasively argued that in theory such arguments could be raised without being critical of the forum legal system. After all, owing to concerns of international comity, the forum court generally avoids passing judgments on foreign legal systems, and yet it could make the finding that the plaintiff will not be able to obtain substantial justice in the foreign court. He also observed that such arguments are in principle not foreclosed by Lord Goff's judgment in the *Spiliada*.

[85] *SICC Committee Report* (n 27) [26]–[27].

[86] Yeo (n 47) 13.

[87] Yeo has pointed out also that '[t]he fact that fresh rules are drafted on international jurisdiction indicates an intention to depart from the pre-existing law': see ibid.

[88] AS Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) ch 5. See also *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749.

[89] *Re Schuppan (a bankrupt) (No 2)* [1997] 1 BCLC 256 (Ch); *Petrodel Resources Ltd v Prest* [2013] UKSC 34; [2013] 2 AC 415;*Luo v The Estate of Hui Shui See, Willy, Deceased* [2008] HKEC 996 (CFA (HK)); *Favor Easy Management Ltd v Wu* [2002] EWCA Civ 1464. See also Lee, R and Ho, L, 'Disputes over Family Homes Owned through Companies: Constructive Trust or Promissory Estoppel' (2009) 125 LQR 25 [Find Full Text] [Google Scholar].

[90] See O 110 r 39, Rules of Court.

[91] The pre-action certificate is liable to be set aside if the SICC decides that it has no jurisdiction on the basis that the action is not international or commercial in nature: see Order 110 rule 10(2), Rules of Court.

[92] See Order 110 rule 10, Rules of Court.

[93] See Order 110 rule 11, Rules of Court. It is important to note that Order 110 rule 11(1)(b) provides that where there is exhibited a pre-action certificate certifying that the action is of an international and commercial character, no challenge to jurisdiction can be brought on the basis the action is not of such character, unless the party applies to set aside the certificate.

[94] It is also noteworthy that for the converse transfer of proceedings from the High Court to the SICC (discussed below), Order 110 rule 12(4)(b)(ii) of the Rules of Court explicitly provides that a transfer may be made without the parties' consent. Please see Postscript.

[95] The first transfer case to be heard by the SICC is *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*, SIC/S 1/2015, a US$809 million dispute between an Australian company and an Indonesian company over their joint venture agreement. The case was transferred from the High Court to the SICC. A panel of three judges has been appointed to hear the case: Justice Quentin Loh, Justice Vivian Ramsey and Justice Anselmo Reyes.

[96] Order 110 r 12(4)(b), Rules of Court

[97] Order 110 r 12(4)(a), Rules of Court

[98] Hearing fees and court fees are not relevant considerations as even when the proceedings are transferred from the High Court to the SICC, the parties will pay the fees applicable to High Court proceedings, unless the High Court orders otherwise. See Order 110 r 12(5)(c), Rules of Court.

[99] Order 110 r 12(5)(b), Rules of Court.

[100] In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] SGCA 24, [2015] 3 SLR 1041, [18], the Singapore Court of Appeal observed that contracts have been held to be void and unenforceable on the basis of ousting of the jurisdiction of the courts in very exceptional circumstances and such a category of public policy has only thus far been applied in two areas: (1) agreements to exclude recourse to the court in favour of dispute resolution by a private tribunal or expert; and (2) a wife's covenant to not apply to the court for maintenance from the husband for herself and/or a child.

[101] See discussion above at text to and around nn 90–93.

[102] Order 110 r 12(5)(a), Rules of Court.

[103] In light of the separate provision for internal allocation of jurisdiction based on comparative appropriateness (requirement (iv)), it would seem pointless to construe requirement (iii) regarding whether SICC will assume jurisdiction over the case as a matter concerning internal allocation of jurisdiction. Please see Postscript.

[104] Yeo (n 47) 17.

[105] ibid 17–18.

[106] *Singapore International Commercial Court User Guides – Note 1 (Jurisdiction)* (n 82).

[107] Yeo (n 47) 19–20.

[108] ibid 20.

[109] ibid.

[110] *Singapore International Commercial Court User Guides – Note 1 (Jurisdiction)* (n 82) paras 9 and 10. It is important to note that the SICC may but it is 'not bound' to consider and ascribe weight to arguments based on connections by the party sought to be joined to the SICC proceedings.

[111] [2010] NSWCA 196; 79 ACSR 383.

[112] ibid [79].

[113] Chong, A, 'The "Party Scope" of Exclusive Jurisdiction Clauses' [2011] LMCLQ 474–6 [Find Full Text] [Google Scholar].

[114] For example, under Singapore law, section 2 of the Contracts (Rights of Third Parties) Act (Cap 53B, Rev Ed 2002) sets out the circumstances in which a third party may enforce a contractual term.

[115] Chong (n 113) 477.

[116] Nevertheless, it should be borne in mind that the point of joining third parties to SICC proceedings is underlined by the policy of having related proceedings heard in the contractually chosen forum.

[117] All Member States in the European Union, with the exception of Denmark, will be bound by the Hague Convention.

[118] On 19 January 2015, the Supreme Court of Singapore and the Dubai International Financial Centre Courts signed a non-binding 'Memorandum of Guidance' concerning the reciprocal enforcement of

money judgments <http://difccourts.ae/memorandum-guidance-enforcement-difc-courts-supreme-court-singapore/>.

[119] For this to happen, there are three further steps: (1) the Convention must enter into force internationally; (2) ratification by Singapore; and (3) Singapore must enact legislation to give the Convention the force of law domestically. See Yeo (n 47) 23.

[120] Yeo, TM, 'Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective' (2015) 114 Journal of International Law and Diplomacy 50 [Find Full Text] [Google Scholar].

[121] See eg RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (CUP 2008); Keyes, M, 'Jurisdiction under the Hague Choice of Courts Convention; Its Likely Impact on Australian Practice' (2009) 5 Journal of Private International Law 181 [Find Full Text] [Google Scholar]; T Hartley, *Choice-of-Court Agreements under the European and International Instruments* (OUP 2013); Beaumont, P and Walker, L, 'Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project' [2015] 11 Journal of Private International Law 31 [Find Full Text] [Google Scholar].

[122] Art 1(1), Hague Convention.

[123] A separate definition of 'international' is provided under art 1(3) of the Hague Convention in the context of recognition or enforcement of judgments. In that context, a case is considered 'international' where it concerns the recognition or enforcement of a *foreign* judgment. See also T Hartley and M Dogauchi, *Explanatory Report* (HCCH Publications 2005) <http://www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3> para 11 [*Explanatory Report*]. According to the*Explanatory Report*, the two definitions of 'international' in the different contexts mean that 'a case that was non-international when the original judgment was given may become international if the question arises of recognizing or enforcing the judgment in another State'.

[124] Art 1(2), Hague Convention.

[125] Art 3(c), Hague Convention.

[126] Art 3(a), Hague Convention.

[127] Art 3(b), Hague Convention.

[128] RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (CUP 2008) 175–6.

[129] *Explanatory Report* (n 123) para 18.

[130] For a discussion on the meaning of 'null and void' under the Hague Convention, see Brand and PM Herrup (n 128) 79–80.

[131] See *Explanatory Report* (n 123) para 3.

[132] See art5(2) of the Hague Convention and *Explanatory Report* (n 123) para 3.

[133] Yeo, 'Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective' (n 120) 63.

[134] Yeo (n 47) 26.

[135] Under Singapore law, the court draws a distinction between foreseeable factors and unforeseeable factors; the former are ascribed less weight in the 'strong cause' test (*The Hyundai Fortune* [2004] 4 SLR(R) 548 at [8]). Importantly, more weighty factors include that the jurisdiction agreement is a standard form agreement; the contractual forum cannot be easily determined at the time of contracting; there are very strong connections with a non-chosen forum; the defendant is not genuinely desiring trial in the contractual forum. See discussion in *Halsbury's Laws of Singapore* (n 12) [75.121].

[136] See *Donohue v Armco Inc* [2002] 1 All ER 749. In that case, Lord Bingham said that 'the interests of justice are best served by the submission of the whole litigation to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue' ([34]). cf *Konkola Copper Mines plc v Coromin Ltd (No 2)*[2006] EWHC 1093 (Comm), [2006] 2 Lloyd's Rep 446.

[137] However, note art 22, Hague Convention.

[138] Yeo (n 47) 27.

[139] ibid 24.

[140] See art 5(3), Hague Convention.

[141] Art 5(3)(a), Hague Convention.

[142] It has been argued above that the power is to be exercised only in very exceptional circumstances.

[143] In other circumstances, the SICC may nonetheless order a non-consensual transfer and take the risk of its judgment being refused recognition or enforcement abroad (which possibility is acknowledged in art 8(5) of the Convention). For example, it may choose to do so if the defendant's assets are substantially in Singapore. The factual context of the dispute is thus very important.

[144] Where the parties wish to submit applications for interlocutory relief to the SICC, it should be noted that according to the*Singapore International Commercial Court Practice Directions* (*SICC PD*), '[a]s far as possible, the SICC Registry will assign all interlocutory applications in matters before the [SICC] to the Judge who will be hearing the trial or other dispositive matter of the matter'. A copy of the *SICC PD* is available at: <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/rules/singapore-international-commercial-court-practice-directions.pdf>.